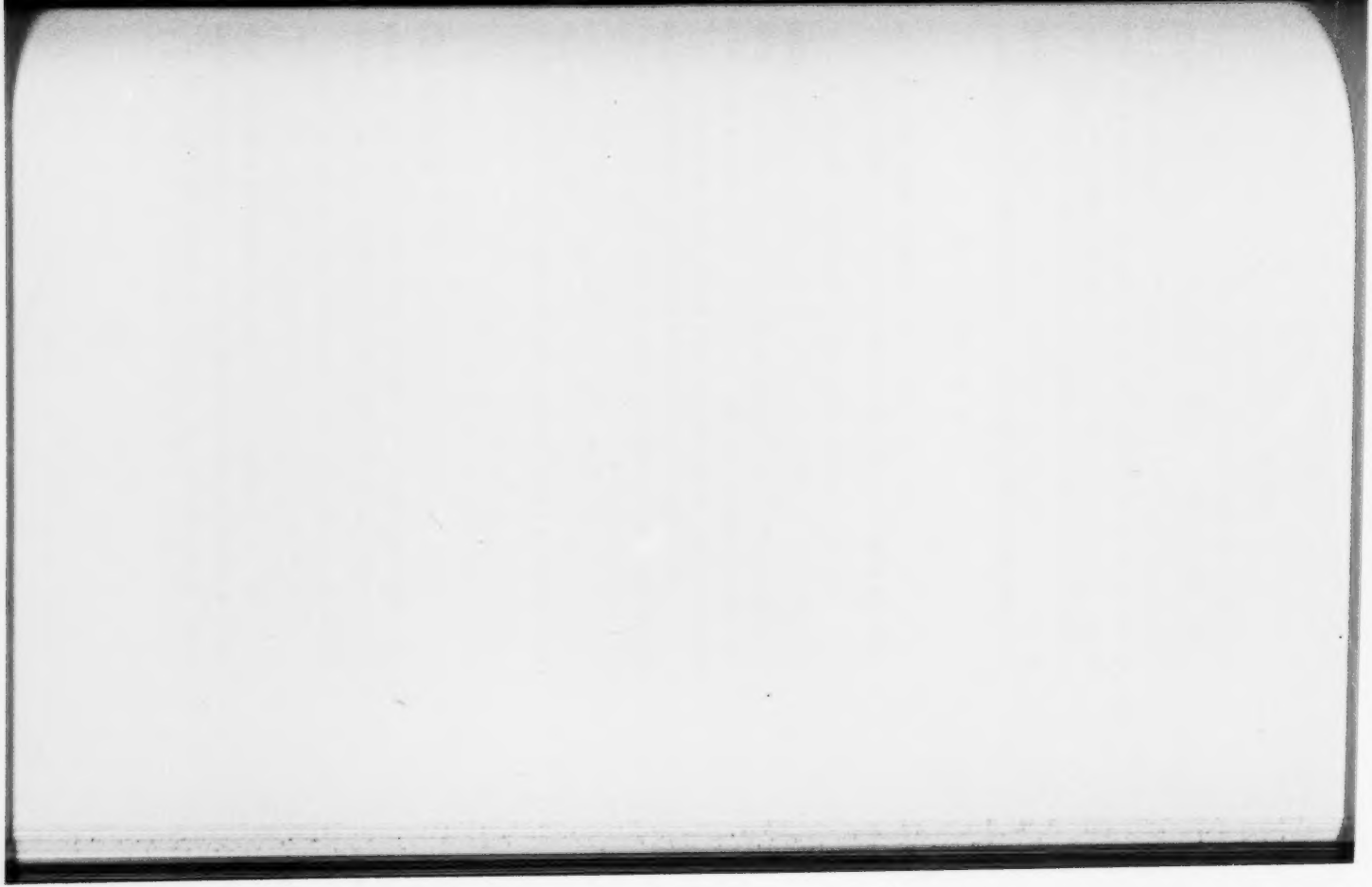


(13)

Supreme Court of the United States

OCTOBER TERM, 1942.

NO. 978

HOWARD NATIONAL BANK AND TRUST COMPANY,
Petitioner,

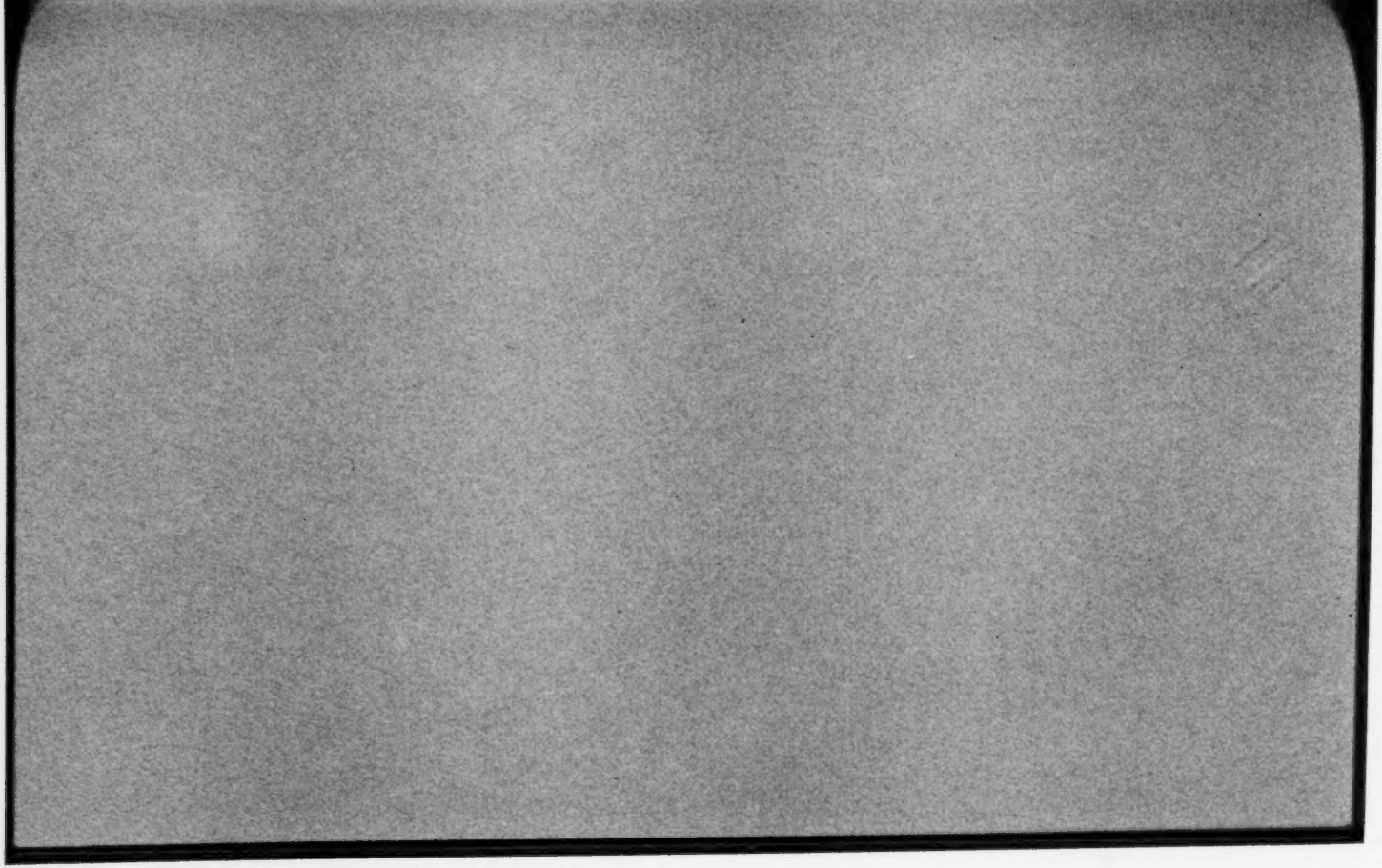
vs.

EMILY TENNEY MORGAN, MARIAN BAYLEY BUCHANAN, RICHARD MORGAN, et al.,
Petitionees.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT.

BRIEF FOR PETITIONEES (Beneficiaries)

FILED , 1943.



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On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

I.

ALL FEDERAL QUESTIONS RELIED UPON WERE DECIDED BY THIS COURT YEARS AGO ADVERSELY TO THE PETITIONING BANK.

Twice the United States Supreme Court has held that Section 3 of the Act of Congress of February 25, 1927, C. 191, 44 Stat. 1224 does not make a national bank a successor Executor by reason of a consolidation of a national bank with a state bank, which is Executor, if it is contrary to the probate law of the state.

In a third case it has also applied the same ruling to an administrator.

And yet here is another petition for certiorari asking this Court to order up another case involving the same question and to reverse the three prior decisions. This, too,

in the face of the fact that this Court rendered an opinion in 1929 clearly stating the law as above set out, and the consolidation involved in this case was two years afterwards, in 1931.

The difficulties, in which the Howard National Bank and Trust Company (hereinafter called Bank) finds itself now, are due to its neglect and the neglect of its lawyers.

The statement that determination of this case effects others is without support in or outside of the record. The first and most important decision of this Court was in 1929. It is not likely that there has been another consolidation since then where the proper steps to comply with the Probate law of the state have not been taken.

It is probable that the Statutes of other states have been amended as those in Vermont have (Acts of 1933, No. 123, Section 6), and as Section 3 of the United States Statute has been amended. Act of June 16, 1933, C. 89, Sec. 24, 48 Stat. 100.

It is also probable that all cases involving consolidations before 1929 were disposed of long ago.

The three cases above referred to are:

(A) Ex Parte Worcester County National Bank, 279 U. S. 247, decided in 1929, where, as in this case, a State Bank had been appointed executor, and subsequently consolidated with a National Bank, which this Court held did not become executor.

A portion of the opinion of the Massachusetts Court 263 Mass. 444 under the heading "Second," Pages 450 to 455 emphasizes the character of an executorship, and that part of its opinion is regarded by this Court as summarized in the last sentence under that heading as follows: (279 U.S. 358)

> "To treat the national banking association into which the State Trust Company has been consolidated as preserving the identity of the Trust Company in this particular would be contrary to the juridical conception and practice touching the appointment of such fiduciaries under the law of this Commonwealth."

The Vermont Supreme Court has held the same thing
regard to Vermont law. It says that Vermont Probate
aw will not recognize any one as executor who is not named
the Will. The result of the Vermont decision is the same
in the Worcester Bank case, viz.: that if the Howard
ational Bank and Trust Company after consolidation
esired to continue the administration of the estate, it had
be appointed Administrator by the Probate Court.

The U. S. Supreme Court at the bottom of Page 360
aid:

> "We think Sec. 3 enjoins upon the national bank complete conformity with the Massachusetts law in its conduct of estates of deceased persons when acting as trustee or administrator thereof."

Moreover, the Massachusetts Court held that as Section
of the Federal Law required the Courts of the state to
ecognize the consolidated National Bank as executor, it
as unconstitutional. This Court avoided that question
y holding that Sec. 3 did not require the State Courts to
ecognize any one as executor or administrator in contra-
ention of State law.

To distinguish the Worcester Bank case from this one,
he Bank relies upon the difference in Massachusetts and
ermont law as to what became of the Charter of the State
Corporation after the consolidation. That difference as
laimed, is that in Massachusetts by statute, the State
Charter terminated upon consummation of the consolida-
ion, whereas in Vermont the Supreme Court of the State
as held that the State Charter continued until according to
tatute, it was forfeited for non-payment of franchise tax.

In substance and legal effect there is no difference. If
Massachusetts had control of the State Charter and could
extinguish it by statute as a result of the consolidation, as
Massachusetts did, so that no part of the corporate entity
of the state corporation was projected into the Federal
corporation, Vermont had control of the State Charter and
after consolidation, could continue that charter as a State

Charter exclusively and a year later extinguish it for failure to pay a tax. Throughout, the State had complete control of the State Charter, entirely free from Federal interference. Whether the corporate existence of the State Corporation ended or continued at the time of consolidation, it was not projected into the corporate being of the Federal Bank. It could not continue to exist both independently and as part of the National Bank. Its right to exist—its corporate existence—was indivisible. It could not be split up, and part of it pass into a Federal Corporation and part remain subject to State law. The state had control of the whole and the Vermont Supreme Court has declared the State law to be that the Charter of the Trust Company continued wholly and exclusively as a State charter and that no part of its corporate franchise granted by the State passed out of the State's control, into the Federal corporation.

If the Federal Statute undertakes to provide differently, it violates the Federal constitution. Hopkins Savings Ass'n. v. Cleary, 296 U. S. 315.

(B) Hofheimer v. Seaboard National Bank (Va.), 153 S. E. 656.

A State Bank was named as Co-executor. Before testator's death, the State Bank consolidated with a National Bank, which applied to be appointed Co-Executor. It was held that the executorship was not transferred to the National Bank by consolidation under Section 3.

Petition for certiorari was denied. 283 U. S. 855.

This decision and the reasons stated for it in the opinion are substantially the same as those of the Vermont Court. The only difference between the two cases is that in the Virginia case, the testator died after consolidation instead of before it.

(C) Stevens v. First National Bank and Trust Company (Ga.), 160 S. E. 243. Petition for Certiorari denied. 284 U. S. 684.

A State Bank had been appointed Administrator and subsequently consolidated with a National Bank. It was held the national bank did not become administrator by reason of the consolidation under Section 3. The decision is based largely on the decision in the Worcester Bank case, which is quoted extensively.

These cases make it obvious that no new question is presented to the Supreme Court by this petition.

II.

DETERMINATION BY THE VERMONT SUPREME COURT THAT THE BANK'S CLAIMS CONTRAVENE VERMONT LAW IS CONCLUSIVE. THESE CLAIMS MUST BE DISALLOWED BECAUSE THE FEDERAL LAW PROVIDES CONSOLIDATION SHALL NOT CONTRAVENE STATE LAW.

Determination of what is the law of a State by its court of last resort is conclusive upon this and all other Courts. It matters not whether the Court bases its decision on language of State statutes, or implications from them or upon unwritten law.

The Bank has fallen into the obvious error of taking the position that the State law must be expressed by statute to be effective against Federal legislation.

The Vermont Supreme Court has decided:

(1) That it would be in contravention of Vermont law for the Howard National Bank and Trust Company to become executor of the Will of Harris R. Watkins, which named the City Trust Company executor (See paragraphs 11 and 12 of the opinion).

(2) That it would be in contravention of Vermont law to project the State Charter—the State corporate being—of a State Trust Company into a Federal corporation as a result of "consolidation" under Federal Statutes (See paragraphs 13, 14 and 15 of the opinion).

The Federal Statute here involved expressly provides: "No such consolidation shall be in contravention of the law of the State under which such bank is incorporated."

This consolidation was effective insofar as it did not contravene state law. But results, which are in contravention of State law, cannot be established by the consolidation.

The Bank says at the top of Page 28 of its brief: "The right of the consolidated bank to executorship is thus dependent upon the continued corporate entity of the State Bank within the consolidated bank." But this result does not follow for the reason that it would contravene the State law as declared by the Vermont Supreme Court.

In the first three cases above cited, as in this case, the consolidation was held to be lawful and to have been consummated, but in all it has been held that the consolidation did not result in making the Federal Bank an Executor or Administrator, because to do so, would be in contravention of State law.

III.

STATE CHARTER WAS EXCLUSIVELY UNDER STATE CONTROL. THE BANK'S ARGUMENTS ARE FRIVOLOUS.

The Vermont Court held (Paragraphs 11 and 12) that Vermont "law does not recognize any right to succession to the office of an executor by a person or corporation not designated by the testator in his Will," and that the Howard National Bank and Trust Company "did not become the legal executor of the Will of Harris R. Watkins as a result of the consolidation."

This ended the case so far as the Howard National Bank and Trust Company was concerned.

It had not become executor. Having held that under Vermont law, the Howard National Bank and Trust Company did not become executor, it necessarily followed according to the decisions above referred to that the Federal Statute did not make it executor.

This concluded all substantial Federal questions in this case. There was no other question left for jurisdiction of this Court.

But in order to dispose of the case, the Vermont Court properly considered in Paragraphs 13, 14 and 15 of its opinion the questions of whether the executorship of the City Trust Company had ended and if so, when. Decision obviously did not involve any Federal question. It involved only interpretation and application of Vermont Statutes governing a corporation created and existing only by authority of the State. Over such matters the Federal Government has no control.

The Vermont Court held that according to Vermont law, the charter of the City Trust Company continued exclusively under Vermont control until its charter was revoked according to the law of Vermont for failure to pay a franchise tax, at which time its executorship terminated.

To be sure the Bank contended that after the consolidation, Vermont was without power to control or terminate the corporate existence of the City Trust Company, and this contention forms the basis of the argument in the Brief of the Bank, including that part relating to taxation.

This contention is obviously falacious. It was necessarily rejected by this Court in the three cases above referred to, although the Court did not regard it as of sufficient importance to expressly deal with it in its opinion. It was also decided adversely to the Bank in Hopkins Savings Association v. Cleary, 296 U. S. 315.

The arguments as to projection of the corporate existence of the City Trust Company into the Howard National Bank and Trust Company and as to taxation by the State of a Federal Agency are frivolous.

Moreover, it has been held that if the Federal Statute should be construed in accordance with the Bank's claim, it would violate the Federal Constitution. Hopkins Savings Ass'n. v. Cleary, 296 U. S. 315.

IV.

PETITIONER REQUESTS ISSUANCE OF WRIT TO WRONG COURT.

The petition is for a writ of certiorari to the Supreme Court of the State of Vermont. The record shows that the case is no longer in that Court. It was certified back to the Probate Court for the District of Chittenden March 4, 1943 (Record, P. 64). The judgment of the Supreme Court therefore has been carried out.

The request in the prayer for issuance of a writ to the Probate Court is not for a writ independent of the writ to the State Supreme Court, but is for one ancillary and supplementary to it. According to the prayer, a writ is not to issue to the Probate Court, unless one is issued to the Supreme Court. One cannot issue to the Supreme Court because the case is no longer there.

The petition should be dismissed for this reason as well as upon the merits.

Respectfully submitted,

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Dated May 3rd, 1943.